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In the Supreme Court of the United States

Kent W. Lewis,

Petitioner,

vs.

Iowa District Court for Des Moines County,

Respondent.

Docket No.
October Term 1996

Margaret E. Haessler,

Petitioner,

vs.

Iowa District Court for Des Moines County,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Iowa

Petition for Writ of Certiorari

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Kent W. Lewis and Margaret E. Haessler

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Questions Presented for Review

I. By providing caps of $60 per hour and $1600 per appeal, do the Iowa fee guidelines for court-appointed attorneys, on their face or as applied, violate the Fourteenth Amendment to the Constitution of the United States by denying equal protection to indigents: effectively denying counsel to indigents, chilling effective representation of indigents and denying seasoned counsel to indigents?

II. By providing operating caps of $60 per hour and $1600 per appeal, do the Iowa fee guidelines for court-appointed attorneys, on their face or as applied, violate the Fifth Amendment to the Constitution of the United States, as applied to the states by the Fourteenth Amendment, by denying substantive and procedural due process to indigents by reason of chilling of effective representation and by reason of tendency to deny seasoned counsel to indigents?

III. By providing operating caps of $60 per hour and $1600 per appeal, do the Iowa fee guidelines for court-appointed attorneys, on their face or as applied, violate the Sixth Amendment to the Constitution of the United States by effectively denying counsel to indigents, and by chilling effect on representation of indigents and tendency to deny seasoned counsel to indigents?

Opinion filed by Supreme Court of Iowa is reported at: *Lewis and Haessler v. Iowa District Court*, 555 N.W.2d 216 (Iowa 1996).

Statement of Basis for Jurisdiction

Date of Iowa Supreme Court judgment sought to be reviewed is October 23, 1996.

Rehearing was denied November 18, 1996.

Jurisdiction to review judgment of Iowa Supreme Court by United States Supreme Court is conferred by 28 *U.S.C.* §1257.

Constitutional Provisions and Statutes Involved

Fifth Amendment to the Constitution of the United States.

Sixth Amendment to the Constitution of the United States.

Fourteenth Amendment to the Constitution of the United States.

Rule 4(b), *Iowa Guidelines – Costs of Court-Appointed Counsel.*

Rule 6, *Iowa Guidelines –Costs of Court-Appointed Counsel.*

Statement of the Case

The Supreme Court of Iowa consolidated for argument and ruling two attorney fee appeals. Kent Lewis was court-appointed in a delinquency proceeding

(criminal-juvenile). Margaret Haessler was court-appointed in a juvenile child in need of assistance proceeding.

Lewis

Fifteen-year-old was adjudicated delinquent (felony of second degree robbery). State Appellate Defender declined representation in appeal of adjudication because of accelerated briefing schedule required in juvenile appeals. Kent Lewis was appointed to represent indigent juvenile on appeal of adjudication. Mr. Lewis would normally require a $5,000 retainer on appeal, about half of which would go to overhead. His normal hourly rate is $100. He was awarded $1600 plus $500 for over 52 hours of work.

Haessler

Ms. Haessler was appointed to represent indigent mother of juvenile who had been adjudicated a child in need of assistance. She was awarded $2100 for appeal ($1600 + 500) for over 70 hours of work.

Facts

Constitutional issues concerning which certiorari is sought were first raised in Associate District Court of Iowa prior to hearing on fixing appellate fees. A writ of certiorari then issued from the Supreme Court of Iowa to review the same issues. Supreme Court of Iowa annulled the writ, ruling in favor of Associate District Court. Rehearing on same constitutional issues was denied.

At hearing two practicing attorneys in addition to Lewis and Haessler testified concerning the economics of the

practice of law. An Associate District Court Judge also testified concerning how he awards fees to lawyers on court-appointments.

The record amply documents the constitutionally arbitrary nature of the statutory hourly cap and the statutory total cap, and the shocking inadequacy of the fee scheme considering the responsibilities assumed by the lawyer and the expense to the lawyer of the representation. The record also lays out the chilling effect on aggressive representation and the denial to indigents of seasoned counsel as a result of the fee scheme.

Reasons to Grant Writ

1. The right to effective counsel in cases where parental rights can be terminated and in cases involving criminal taint is among the most fundamental rights guaranteed by the Constitution.

2. Many states are presently balancing their budgets and accumulating surpluses on the backs of indigent defendants whom they deny effective counsel by statutory schemes that guarantee that seasoned counsel will do everything possible to avoid appointment. Counsel that is appointed is forced into compromising ethical positions as a result of forced acceptance of shockingly inadequate compensation.

IT IS REQUESTED writ issue to the Iowa Supreme Court for the reasons set forth; it is further requested that the designated rules with respect to fixing fees for court-appointed counsel be declared unconstitutional for the reasons stated.

Respectfully submitted,

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Attorneys for Petitioners
Kent W. Lewis and Margaret E. Haessler

Appendix

555 N.W.2d 216, Supreme Court of Iowa

Kent W. LEWIS, Plaintiff,
v.
IOWA DISTRICT COURT FOR DES MOINES COUNTY, Defendant.
Margaret E. HAESSLER, Plaintiff,
v.
IOWA DISTRICT COURT FOR DES MOINES COUNTY, Defendant.

Nos. 95-561, 95-562.
Supreme Court of Iowa.
Oct. 23, 1996.
Rehearing Denied Nov. 18, 1996.

David A. Hirsch of Beckman & Hirsch, Burlington, for plaintiffs.

Thomas J. Miller, Attorney General, and Diane Stahle, Assistant Attorney General, for defendant.

Considered by McGIVERIN, C.J., and CARTER, LAVORATO, SNELL, and ANDREASEN, JJ.

SNELL, Justice.

These two above-captioned cases have been consolidated for review purposes, on this court's own motion, due to the similarity of issues. In both cases the plaintiffs challenge by petitions for writ of certiorari the fee guidelines for payment of court-appointed attorneys as being in violation of various constitutional and statutory laws. The district court rejected plaintiffs' arguments and denied any relief. We annul the writs.

I. Background Facts and Proceedings

In the first captioned case, plaintiff Kent Lewis, an attorney, represented a juvenile in a delinquency adjudication proceeding and on appeal pursuant to court appointment. After the appeal was completed, Lewis filed a request for a fee authorization of up to $3500 for the prosecution of the appeal. Lewis submitted a statement requesting fees in the amount of $3036 plus expenses of $286.30. The fee guidelines provide that the normal fee for appellate attorney work on court appointments is from forty to sixty dollars per hour with a maximum allowable fee of $1600 for an appeal in a juvenile case. Fees in excess of that amount must receive prior court authorization. At the hearing on the fee request, Lewis submitted evidence that his normal billing rate is $100 per hour and that the rate set by the guidelines is below the rate normally charged by privately retained attorneys. Lewis argues that the lower rates fixed by the guidelines deprive indigents of their rights to equal protection, due process, and assistance of counsel by restricting their legal representation.

After hearing the case, the district court ordered that Lewis was entitled to the normal appeal amount of $1600 plus $500 because of the case's complexity and the time expended on the appeal. We granted Lewis' petition for writ of certiorari challenging the district court's fee order.

In the second captioned case, the plaintiff, Margaret Haessler, was appointed counsel for an indigent mother in a child-in-need-of-assistance proceeding at trial and on appeal. The district court approved Haessler's initial request for fee authorization up to $3000 for her trial work. In addition to the specific fee request that had been approved, she sought an additional $4200 for her appellate representation of the mother. The fee guidelines set the normal compensation rate for appellate work in court appointments at forty to sixty dollars per hour with a total amount above $1600 requiring prior court approval.

Haessler filed a supplement to the request for additional fee authorization challenging the constitutionality

of the maximum hourly rate as well as the total fee set by the guidelines. Haessler claimed that the requirements denied indigents their constitutional rights to equal protection, due process, and effective assistance of counsel. At a hearing on the fee authorization request, which was combined with the request for fees in the Lewis v. Iowa District Court case, Haessler presented evidence that her normal billing rate was eighty dollars per hour. In addition, evidence was presented indicating that the average billing rate for attorneys was higher than that provided by the fee guidelines and that the normal cost of an appeal of this type was more than the $1600 level set by the guidelines.

The district court entered an order authorizing fees to be awarded for Haessler's representation of $1600 plus an additional $500. We granted Haessler's petition for a writ of certiorari challenging the legality of the court's fee order.

II. Legal Issues

In both of these cases, plaintiffs' attorney asserts the following legal propositions:

a. The operating caps of $60 per hour and the $1600 maximum fee per appeal, without prior court authorization for additional fees, violate the Fourteenth Amendment to the United States Constitution by denying equal protection of the law to indigents in that the caps effectively deny counsel to indigents, have a chilling effect on counsel's representation of indigents, and tend to deny seasoned counsel to indigents.

b. The operating caps, on their face or as applied, violate the Fifth Amendment to the United States Constitution, as applied to the states by the Fourteenth Amendment to the United States Constitution, by denying substantive and procedural due process to indigents, in that effective representation is not provided, a chilling effect on the attorney's representation occurs, and a tendency to deny seasoned counsel to indigents results.

c. The operating caps, on their face or as applied, violate Iowa statute, section 815.7, regarding fees for court-appointed attorneys and case law that require payment of reasonable compensation.

In the Lewis case, an additional assignment of error is made. That assignment is:

d. The operating caps, on their face or as applied, violate the Sixth Amendment to the United States Constitution, by effectively denying counsel to indigents, by having a chilling effect on the attorney's representation of indigents, and by having a tendency to deny seasoned counsel to indigents.

III. Standard of Review

Ordinarily we review a certiorari action for correction of errors at law. Iowa R. Civ. P. 306; Whitlock v. Iowa Dist. Ct., 497 N.W.2d 891, 893 (Iowa 1993); Zimmermann v. Iowa Dist. Ct., 480 N.W.2d 70, 74 (Iowa 1992). But the existence of a constitutional issue requires us to review de novo the evidence bearing on that claim. Montgomery v. Bremer County Bd. of Supervisors, 299 N.W.2d 687, 692 (Iowa 1980). Certiorari review of constitutional issues requires an independent evaluation of the totality of the circumstances under which the challenged ruling on the constitutional issues was made. Webster County Bd. of Supervisors v. Flattery, 268 N.W.2d 869, 872 (Iowa 1978).

IV. Constitutionality of Fee Guidelines

A. Standing

Neither plaintiff is contesting a particular fee award, but instead they challenge the entire scheme of fees for court-appointed attorneys. The State contends that both plaintiffs lack standing to bring this issue before the court because neither seeks personal relief, but relief on behalf of all indigents who have court-appointed attorneys. Although their primary argument is based upon the harm done to indigent defendants, both plaintiffs claim that

court-appointed representation has an adverse impact on their income as practicing lawyers.

Plaintiffs also assert they suffer "personal aggravation" in that they are paid forty to fifty percent less for court-appointed cases than for cases they would personally select in their respective private practices. They presented evidence that the average overhead for a lawyer's office is fifty percent of every $100 in gross income. They state that it is still fifty percent of $100 if the lawyer is only paid sixty dollars instead of $100. Thus, because of constant overhead expenses, they contend the court-appointed fee nets the lawyer about ten dollars per hour. Evidence was presented by other practicing lawyers that appeals like those involved here usually take sixty hours or more so that the $1600 figure is most often exceeded. Plaintiffs argue that law offices can no longer subsidize court appointment work by income from other legal work and that young lawyers, who need and want work from court appointments, are unfairly compensated at the start of their careers when they are already burdened by heavy educational debt. They further contend that older, more experienced lawyers, refuse these under-compensated appointments because they wish to give prompt legal service to their regular clients and fear that they will lose them if their time is consumed by court appointments.

The State correctly notes the general principle that litigants cannot challenge the constitutionality of a statute unless they can show they have been injured by it. Green v. Shama, 217 N.W.2d 547, 556 (Iowa 1974). In granting third party standing, the United States Supreme Court has articulated two requirements before a third party may assert the constitutional rights of another:

"When a person or entity seeks standing to advance the constitutional rights of others, we ask two questions: first, has the litigant suffered some injury-in-fact, adequate to satisfy Article III's case-or-controversy requirement; and second, do prudential considerations ... point to permitting

the litigant to advance the claim?" Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624, n. 3, 109 S.Ct. 2646, 2651, n. 3, 105 L.Ed.2d 528, 540, n. 3 (1989).

As stated above, we believe the plaintiffs have presented sufficient testimony establishing that they have an adequate interest in the fee award to meet the constitutional minimum for standing. In addressing the prudential considerations, the Court has emphasized two additional concerns: first, that constitutional rights should not be litigated unnecessarily, and second, that the third party may not be able to advocate the right as effectively as its actual holder. See Singleton v. Wulff, 428 U.S. 106, 113-14, 96 S.Ct. 2868, 2873-74, 49 L.Ed.2d 826, 832-33 (1976).

In light of these prudential concerns, we find that the plaintiffs satisfy the requirements for third party standing. Although the Caplin case did not concern fees for court-appointed attorneys, we find the Fourth Circuit's analysis to be helpful. In considering whether a law firm had standing to assert the constitutional rights of its client in order to recover its fee, the court found

"The assertion of this constitutional claim is extremely important to Caplin & Drysdale, criminal defendants, and the bar, and its resolution is in no way 'unnecessary.' Caplin & Drysdale is fully "as effective a proponent" of the right asserted as the defendant." In re Forfeiture Hearing as to Caplin & Drysdale, Chartered, 837 F.2d 637, 642 (4th. Cir.1988) (citation omitted), aff'd sub nom. Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989).

The same considerations are present in the cases before us. We agree that the issues of a defendant's right to effective representation and an attorney's right to fair compensation in cases such as these are "inextricably linked." Hillsborough County v. Unterberger, 534 So.2d 838, 841 (Fla.Dist.Ct.App.1988). Therefore the circumstances particular to court-appointed representation warrant this review. To deny standing in cases such as these would put

a lawyer in the unfavorable position of having to admit that inadequate representation was provided, thus raising the specter of malpractice and bar sanctions.

B. Constitutional Questions

The Guidelines on Costs of Court-Appointed Counsel provide specific fee amounts that cannot be exceeded without prior court authorization. Exhibit "A" to the guidelines, which specifies the maximum fee awarded without prior approval has not been updated since 1986. But this does not necessarily mean that the guidelines are unconstitutional. There is no showing that any particular indigent actually was placed at a disadvantage by the fee guidelines. Plaintiffs offer neither proof nor law to support their argument that the rights of indigent defendants are compromised by fees that are below the prevailing rate for such work in the community. Instead, they draw upon conclusions that the statutory cap creates a "chilling effect" on attorneys who are asked by the court to provide competent and zealous representation for an indigent client and imply that, as a result, the quality of representation indigents receive is unconstitutionally substandard.

In Iowa, attorneys are obligated to represent indigent persons when appointed by the court. See Iowa Code of Professional Responsibility for Lawyers EC 2-31 (1996). We agree with the Alabama Supreme Court's analysis when it considered a similar challenge to its state's fee guidelines. In assessing the constitutionality of Alabama's system for compensating court-appointed attorneys, the court noted "[t]hese contentions are made on the premise that lawyers will not provide effective assistance unless paid a certain amount of money. But the legal profession requires its members to give their best efforts in 'advancing the "undivided interests of [their] clients." ' " Ex parte Grayson, 479 So.2d 76, 80 (Ala.), cert. denied, 474 U.S. 865, 106 S.Ct. 189, 88 L.Ed.2d 157 (1985) (quoting Polk County v. Dodson, 454 U.S. 312,

318-19, 102 S.Ct. 445, 449-50, 70 L.Ed.2d 509 (1981)). As we have noted,

"Of course, counsel cannot offer a defendant only token representation because his compensation is inadequate. His remedy would be to withdraw from the case. If he stays on, he must afford the defendant the kind of effective representation to which every defendant is entitled. " State v. Nelson, 279 N.W.2d 1, 3 (Iowa 1979).

In Postma v. Iowa District Court, 439 N.W.2d 179 (Iowa), cert. denied, 493 U.S. 918, 110 S.Ct. 278, 107 L.Ed.2d 258 (1989), we considered the question of whether the same fee guidelines for court-appointed attorneys in criminal cases create a similar chilling effect on indigent representation. The fact that both cases before us involve juvenile proceedings does not alter the underlying analysis. In Postma, as in the cases before us, the appellant did not provide sufficient evidentiary or legal support for his assertion that indigents were denied effective representation by the fee guidelines. Postma, 439 N.W.2d at 182. In rejecting his claim, we reiterated that:

"[A] per se violation of the right to effective counsel may exist even though counsel is available if 'the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.'" Id. (quoting United States v. Cronic, 466 U.S. 648, 659-60, 104 S.Ct. 2039, 2047, 80 L.Ed.2d 657, 668 (1984)). As was the case in Postma, plaintiffs' arguments do not persuade us that this is a case where the presumption of prejudice is so strong as to create a per se constitutional violation. Absent a showing of specific harm to an indigent's constitutional rights, plaintiffs' claims are without merit.

Furthermore, Sixth Amendment claims in similar cases as these have not been tenable unless the court-appointed counsel is totally uncompensated or unless the bar is required to assume the entire burden of indigent

defense for nominal compensation with no provision for a public defender system. See Bradshaw v. Ball, 487 S.W.2d 294, 298 (Ky.1972); State ex rel. Partain v. Oakley, 159 W.Va. 805, 227 S.E.2d 314, 319 (1976). Iowa law sufficiently provides for both attorney compensation and a public defender system. See generally Iowa Code ch. 13B (1995). Similarly, equal protection claims have been rejected absent a showing that the burden of court appointments has been distributed unequally among members of the bar. State v. Rush, 46 N.J. 399, 217 A.2d 441, 446 (1966). There is no claim made by either plaintiff that court appointments are disproportionately assigned.

It is important to note that the fee guidelines are not inflexible. The cap only provides for a maximum fee to be paid without prior court authorization. In fact, both of the plaintiffs did apply for and receive fees in excess of the cap imposed by the guidelines. In considering the guidelines in the context of criminal appointments, we noted "[t]he guidelines do set out certain amounts which cannot be exceeded without prior approval of the court. However, they have sufficient flexibility to meet the statutory requirement of reasonable compensation." Postma, 439 N.W.2d at 182. Thus, although the amount awarded a court-appointed attorney may be less than what an attorney may charge a private client, the guidelines themselves are not per se unreasonable.

C. Iowa Law

Finally, plaintiffs assert that the fee guidelines violate Iowa statutory and case law requiring court-appointed counsel for indigent defendants at a fair rate of compensation. They fail, however, to provide facts or law that support this conclusion. There is no evidence in the record that indigent defendants are prejudiced by representation that is compensated at a rate less than that charged at private practice. It may be helpful to reiterate what this court has said before in considering this issue:

[Attorneys] are under no compulsion to accept court appointments for indigent criminal defense work. These appointments are made from a list of attorneys who have voluntarily expressed a desire to undertake such work. The attorneys know that the guideline for payment in these cases will be $40 per hour, unless special circumstances are shown. Their reasonable expectations are satisfied when they are awarded at least $40 per hour, and perhaps more, for their services, as occurred here.

Coonrad v. Van Metre, 362 N.W.2d 197, 200 (Iowa 1985).

Although the fee guidelines may need to be reviewed to reflect the changes in the cost of practicing law in the last ten years, they still provide reasonable compensation for court-appointed attorneys, under constitutional and statutory mandates, and do not violate the constitutional rights of indigents.

WRITS ANNULLED.

-- o --

In the Supreme Court of Iowa
No. 95-561/95-562
Order

Kent W. Lewis
Plaintiff,
vs.
Iowa District Court for Des Moines County,
Defendant.

Margaret E. Haessler,
Plaintiff,
vs.
Iowa District Court for Des Moines County,
Defendant.

After consideration by the court, en banc, plaintiffs' Petition for Rehearing in the above-captioned case is hereby overruled and denied.

Dated this 18th day of November, 1996.

THE SUPREME COURT OF IOWA
Authur A. McGiverin, Chief Justice

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IN THE JUVENILE COURT OF IOWA IN AND FOR DES MOINES COUNTY

IN THE INTEREST OF	)
	)
MISTER LOUIS REDD	)
Juvenile No. JV/JV000155	)
	)
A CHILD	)
ORDER	

AND

IN THE INTEREST OF	)
	)
FRANKIE SMITH JR.,	)
Juvenile No. JD758	)
	)
A CHILD	)
ORDER	

These matters came on for hearing before the Court March 6, 1995 on application for attorney's fees. Present were Ronald Robertson, assistant county attorney; Margaret Haessler and Kent Lewis, with David Hirsch, acting as attorney for both Mr. Lewis and Ms. Haessler.

It appears both matters being presented to the Court involve requests for attorney fees to appeal the trial court judgments, the amount requested for fees being substantially in excess of Supreme Court guidelines. The Court has heard the evidence presented, as well as the constitutional arguments

made by Mr. Hirsch; and after review of the arguments and presented, the Court denies the constitutional objection propounded.

It appears appropriate for the Court to follow the guidelines which provide an allowance of $1,600.00, and the Court in addition, allows $500.00 in each case as an adjustment for the complexity of the causes and the accelerated time for perfection of the appeal. There having been allowed the sum of $990.00 to Ms. Haessler previously for this appeal, the award to Ms. Haessler is $1,100.00, and to Mr. Lewis a fee is allowed in the sum of $2,100.00. Fees as requested in excess of this allowance are denied.

Dated and signed March 6, 1995.

Gary J. Snyder
Judge of the Juvenile Court

-- o --

IN THE JUVENILE COURT OF IOWA IN AND FOR DES MOINES COUNTY

IN THE INTEREST OF	)
FRANKIE SMITH JR.,	)
Juvenile No. JD758	)
A CHILD	)

ORDER

Petitioner Kent W. Lewis's Rule 179(b) Motion to Enlarge Findings is hereby denied.

Dated and Signed March 22, 1995.

Gary J. Snyder
Judge of the Juvenile Court

-- o --

IN THE JUVENILE COURT OF IOWA IN AND FOR DES MOINES COUNTY

IN THE INTEREST OF)
)
MISTER LOUIS REDD,)
Juvenile No. JV/JV000155)
)
A CHILD)

ORDER

Petitioner Margaret E. Haessler's Rule 179(b) Motion to Enlarge Findings is hereby denied.

Dated and Signed March 22, 1995.

Gary J. Snyder
Judge of the Juvenile Court

-- o --

Fifth Amendment to the Constitution of the United States of America:

"nor shall any person * * *be deprived of live, liberty, or property, without due process of the law"

Sixth Amendment to the Constitution of the United States of America:

"In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence."

Fourteenth Amendment to the Constitution of the United States of America:

" * * * nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Guidelines on Costs of Court-Appointed Counsel:

Exhibit A:

"Amounts which cannot be exceeded without prior approval of the district court in accordance with paragraph 4(b) of the guidelines: * * *

"8. Appeals to the Iowa Supreme Court, $1,600.

"11. Representation of party at juvenile case adjudication and disposition, $500."

Rule 4 Guidelines on Costs of Court-Appointed Counsel:

"In performing services, attorneys shall be governed by applicable statutes and rules as well as by relevant provisions of the Iowa Code of Professional Responsibility for Lawyers.

a. When required to do so by law or when the attorney has any question about the propriety of incurring a particular expence, the attorney shall obtain court approval before incurring the obligation.
b. In addition, the attorney must obtain advance district court approval for anticipated compensation in excess of amounts that shall be established for particular categories of cases from time to time by the supreme court. Until modified by subsequent order of this court, those amounts are as shown on exhibit "A" attached to these guidelines.

(1) The purpose of requiring such approval is not to inhibit reasonably necessary services, but to provide a system for monitoring and a basis for predicting and budgeting amounts necessary for such compensation.

(2) In determining whether an application should be sustained, the court shall consider whether the anticipated services are necessary in the reasonable professional judgment of counsel. The requirement that an application be made shall not have any bearing on whether an application should be sustained. Moreover, the court shall not require disclosure by the attorney of any information not subject to discovery under applicable law.

(2) Such applications, except as to appeals, ordinarily shall be made at arraignment, and in any event within the period available for discovery prior to trial. They shall not be made later except upon a showing of good cause.

(3) (c.) Nothing in these guidelines shall affect the duty of the court to determine the amount of allowable compensation for court appointment services in accordance with applicable statutes.

Rule 6 Guidelines on Costs of Court-Appointed Counsel:

When applicable law requires compensation to be made on the basis of ordinary and customary charges for like services in the community, the court shall not reduce compensation based on an attorney's duty to represent the poor but shall consider all of the factors dictated by pertinent statutory law and supreme court decisions, including certainty of payment. Moreover, the court shall consider the evidence, its own knowledge on the subject, and any other relevant information bearing on the issue. In order to provide

guidance to the court and to foster uniformity in compensation for like services in like communities in the state, the supreme court shall from time to time promulgate guidelines including a range of hourly rates reflecting ordinary and customary charges for like services in the communities of the state, as provided by statute. Until modified by subsequent order of this court, that range is determined as shown in exhibit "A" attached to these guidelines. These guidelines shall be considered by the court, along with all other relevant information, in determining the reasonable value of the attorney's services in the community in question.

No. 96-1371

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

KENT W. LEWIS,

Petitioner,

vs.

IOWA DISTRICT COURT FOR DES MOINES COUNTY,

Respondent.

MARGARET E. HAESSLER,

Petitioner,

vs.

IOWA DISTRICT COURT FOR DES MOINES COUNTY,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Iowa

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE IOWA SUPREME COURT

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether Petitioners' failure to produce any evidence of specific harm to their indigent clients is fatal to Petitioners' constitutional attack on the fee guidelines for court appointed counsel promulgated by the Iowa Supreme Court?

2. Whether the fee guidelines are constitutional because, as flexible guidelines, the trial judge has the ultimate responsibility and authority to set the amount of attorney fees?

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STATEMENT OF THE CASE

The Petitioners are attorneys who were appointed by the court to represent parties in separate appeals of two juvenile court decisions. Iowa law requires that court appointed attorneys "shall be entitled to a reasonable compensation which shall be the ordinary and customary charges for like services in the community to be decided in each case by a judge of the district court . . . " Iowa Code § 815.7 (1997). The Iowa Supreme Court has established Guidelines for the Costs of Court-Appointed Counsel in response to its responsibility regarding payment of attorney fees and expenses for indigents. The Guidelines set forth a maximum hourly rate and total fee for various types of cases which cannot be exceeded without prior court approval. For appeals, the maximum hourly rate is $60 per hour and the total fee is $1,600.00. The Guidelines make clear, however, that the ultimate decision on the amount of attorney fees is left to the prerogative of the responsible judge in the case. (Petitioner's Appendix, p. 19-21).

The Petitioners each requested of the juvenile court that they be compensated at a rate in excess of the amount set for handling appeals. The juvenile court in each case awarded fees in excess of the guideline amounts, but less than the amount requested by the attorneys. The Petitioners did not challenge the amount of the fees they had been awarded. Rather, they argued that the constitutional rights of their indigent clients were violated because the guideline fees are so low that they have a "chilling effect" upon competent attorneys taking such cases, resulting in a lower quality of service for indigents.

The Iowa Supreme Court held that Petitioners failed to prove that the Guidelines violated the constitutional rights of indigents because the Petitioners failed to offer any evidence that indigents in fact received substandard representation as a result of the amount paid their attorneys. The Iowa Supreme Court also found that the Guidelines were not a per se violation of the constitutional rights of an indigent because they were not inflexible. Rather they merely set the maximum fee to be paid without prior court authorization.

REASONS TO DENY THE PETITION

I. PETITIONERS' FAILURE TO PRODUCE ANY EVIDENCE OF SPECIFIC HARM TO THEIR INDIGENT CLIENTS IS FATAL TO PETITIONERS' CONSTITUTIONAL ATTACK ON THE FEE GUIDELINES FOR COURT APPOINTED COUNSEL PROMULGATED BY THE IOWA SUPREME COURT.

Respondent would point out what it believes is a misperception of the facts insofar as the Petition for Writ of Certiorari fails to mention that the reason Petitioners' constitutional claims were not successful was because of a lack of evidence. The Iowa Supreme Court stated:

> Plaintiffs offer neither proof nor law to support their argument that the rights of indigent defendants are compromised by fees that are below the prevailing rate for such work in the community. Instead, they draw upon conclusions that the statutory cap creates a "chilling effect" on attorneys who are asked by the court

> to provide competent and zealous representation for an indigent client and imply that, as a result, the quality of representation indigents receive is unconstitutionally substandard."

(Petitioner's Appendix, p. 12).

The United States Supreme Court does not decide constitutional issues in the abstract. That is what would be required should certiorari be granted in this case because there is no evidence to support Petitioners' claims.

The crux of the Petitioners' argument centers on the claim that indigents are not provided the same quality of representation as are fee paying clients. As such, any equal protection or due process rights which may exist do so by incorporation of the right to counsel guaranteed by the sixth amendment. *State v. Williams*, 285 N.W.2d 248, 254 (Iowa 1979).

In order to prove ineffective assistance of counsel, a defendant must prove that counsel's performance was deficient in that he or she failed to perform an essential duty and that prejudice resulted "to the extent that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674, 698 (1984); *State v. Thornton*, 498 N.W.2d 670 (Iowa 1993). The mere fact that counsel is underpaid is alone no ground for reversal. A defendant is entitled to relief only if prejudice results. *State v. Nelson*, 279 N.W.2d 1 (Iowa 1979).

In this case the Petitioners failed to support their constitutional challenges with either facts or law. There

was no evidence presented from which one could conclude that indigents in general, or the individual clients in the particular cases at issue, did not receive competent legal counsel. If fact, the evidence that was presented showed that competent counsel is available to those in need of court-appointed counsel.

In Iowa there is a public defender system which includes an appellate defender's office. Iowa Code § 13B.4, 13B.11 (1997). (Respondent's Appendix, pp. 1-3). The private bar is called upon to accept court appointments only in situations when the public defender has a conflict or is too busy to take a case. There was no testimony offered by Petitioners with respect to how often that occurs or how many attorneys in the private bar accept, or do not accept, court appointments. None of the attorneys who testified at the hearing stated that they had ever refused to take a court appointed case because of monetary reasons. In fact, the testimony indicated that the Petitioners regularly accept court appointments. There was also no testimony that indigents received a lesser quality of legal representation than private pay clients or that the affirmance/reversal rate was any different for private clients than for indigents.

While Petitioner argued at length that it is not economically feasible for private attorneys to handle court appointments, there was a lack of evidence which would provide the nexus between the amount of payment received in this case and the quality of representation provided. As noted in *State v. Nelson*, 279 N.W.2d 1 (Iowa 1979), an attorney cannot offer a defendant only token representation because his or her compensation is inadequate. *Id.* at 3. If an attorney feels that way, the only

option is to withdraw. If the attorney continues on, the defendant must be afforded the kind of effective representation to which every defendant is entitled. *Id.*

The Iowa Supreme Court correctly held that the Petitioners failed to provide sufficient fact or law to support their claims that the Iowa Attorney Fee Guidelines are unconstitutional.

II. THE FEE GUIDELINES ARE CONSTITUTIONAL BECAUSE, AS FLEXIBLE GUIDELINES, THE TRIAL JUDGE HAS THE ULTIMATE RESPONSIBILITY AND AUTHORITY TO SET THE AMOUNT OF ATTORNEY FEES.

This Court in *United States v. Cronic*, 466 U.S. 648, 659-60, 104 S.Ct. 2039, 2047, 80 L.Ed.2d 657, 668 (1984), held that there could be a per se violation of the right to effective assistance in counsel if "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into actual conduct of the trial."

The Iowa Supreme Court rejected the possibility of a per se constitutional violation, noting that the fee guidelines do not impose inflexible caps. Rather, they set the benchmark for when attorneys must seek advance court approval. In the case of appeals, that amount is $1,600. This does not mean that anyone who is appointed to represent an indigent in a court appointment will never receive more than $1,600 for that appeal. All it means is that if the attorney anticipates that he or she will exceed

that amount, the attorney must get prior court authorization.

The guidelines provide that the ultimate determination as to amount of fees rests with the trial court and is to be based upon statutory and case law, evidence presented at the hearing on fees, the court's own experience and all other information relevant to the issue of the reasonable value of the attorney's services in the community in question. (Respondent's Appendix, pp. 6-7). The fees suggested in the guidelines are thus but one factor to be considered by the court in making the ultimate determination of "the reasonable value of the attorney's services in the community in question." (Respondent's Appendix, p. 7). The guidelines state at § 5(d) that "[n]othing in these guidelines, however, is intended to affect the prerogative of the responsible judge to determine the amount of compensation by appropriate ruling on the application." (Respondent's Appendix, p. 7).

The result reached by the Iowa Supreme Court is in accord with the case law in a number of other states which have found court-appointed fees unconstitutional only when counsel was totally uncompensated, or the guidelines were totally inflexible. *See, Bias v. State of Oklahoma*, 568 P.2d 1269, 1272 (Okla. 1977) (statute limiting fee in murder case to $250 not unconstitutional where counsel able to maintain regular practice and not required to incur extraordinary expense); *People v. Atkinson*, 50 Ill.App.3d 860, 8 Ill. Dec. 932, 366 N.E.2d 94, 99 (1977) (no sixth amendment violation unless counsel was totally uncompensated or unless the bar was required to assume the entire burden of indigent defense for nominal compensation with no provision for a public defender

system); *Makemson v. Martin County*, 491 So.2d 1109, 1112 (Fla. 1986) (Florida statute unconstitutional because set inflexible maximum fees regardless of unusual or extraordinary circumstances); *Arkansas v. Campbell*, 312 Ark. 593, 851 S.W.2d 434 (1993) (statute which set attorney fee cap with no provision for the court to award additional fees found to be unconstitutional on its face); *Bradshaw v. Ball*, 487 S.W.2d 294, 298 (Ky. 1972) (it is unconstitutional to impose the entire burden of indigent expense on attorneys, with no compensation).

The attorney fee guidelines in Iowa are not per se unconstitutional. They are not inflexible and they are not so low as to fall below what is reasonable compensation.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,

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APPENDIX

Iowa Code § 13B.4 and § 13B.11 ..... App. 1
Attorney Fee Guidelines ..... App. 4

* * *

13B.4 Duties and powers of state public defender.

1. The state public defender shall coordinate the provision of legal representation of all indigents under arrest or charged with a crime, on appeal in criminal cases, and on appeal in proceedings to obtain postconviction relief when ordered to do so by the district court in which the judgment or order was issued, and may provide for the representation of indigents in proceedings instituted pursuant to chapter 908. The state public defender shall not engage in the private practice of law.

2. The state public defender shall file with the clerk of the district court in each county served by a public defender a designation of which local public defender office shall receive notice of appointment of cases. Except as otherwise provided, in each county in which the state public defender files such designation, the state public defender or its designee shall be appointed by the court to represent all eligible indigents, whether the case is criminal or juvenile in nature. The appointment shall not be made if the state public defender notifies the court that the local public defender will not provide legal representation in cases involving offenses as identified in the designation by the state public defender.

3. The state public defender may contract with persons admitted to practice law in this state for the provision of legal services to indigent or partially indigent persons.

4. The state public defender is authorized to review any claim made for payment of indigent defense costs

and to take the following action if the state public defender believes a claim is excessive:

a. If the claim is from a noncontract attorney, the state public defender shall request a review by the court granting the claim as to the reasonableness of the claim within thirty days of receipt of the claim.

b. If the claim is from a contract attorney, the state public defender shall request a review by the appointing court as to the reasonableness of the claim within thirty days of receipt of the claim.

5. The state public defender is authorized to contract with county attorneys to provide collection services related to court-ordered indigent defense restitution of court-appointed attorney fees or the expense of a public defender.

6. The state public defender shall report in writing to the general assembly by January 20 of each year regarding any funds recouped or collected for court-appointed attorney fees or expenses of a public defender pursuant to section 331.756, subsection 5, or section 602.8107 during the previous calendar year.

7. The state public defender shall adopt rules, as necessary, pursuant to chapter 17A to administer this chapter and section 815.9.

* * *

13B.11 State appellate defender.

The state public defender shall appoint a state appellate defender who shall represent indigents on appeal in criminal cases and on appeal in proceedings to obtain

postconviction relief when appointed to do so by the district court in which the judgment or order was issued, and may represent indigents in proceedings instituted pursuant to chapter 908 when required to do so by the state public defender, and shall not engage in the private practice of law.

* * *

GUIDELINES – COSTS OF COURT-APPOINTED COUNSEL

See also R.Cr.P. 26.3

1. In implementation of its constitutional duty to exercise supervisory and administrative control of the judicial department, the supreme court deems it necessary to adopt these guidelines to establish procedures for carrying out judicial department responsibilities relating to payment of attorney fees and expenses for indigents when the law requires such payment from public funds.

2. Nothing in these guidelines shall prevent public bodies from establishing public defender offices pursuant to statute or from entering contracts for attorney services consistent with constitutional and statutory constraints. These guidelines shall apply only to court appointment services in situations where compensation is required by law to be determined by a judge of the district court.

3. In making such appointments, the courts shall consider the attorney's competence, diligence and availability to perform the assigned service. The court also shall consider accessibility of the attorney to the represented person, as well as other relevant factors bearing on the effectiveness and efficiency of services.

4. In performing services, attorneys shall be governed by applicable statutes and rules as well as by relevant provisions of the Iowa Code of Professional Responsibility for Lawyers.

a. When required to do so by law or when the attorney has any question about the propriety of incurring a particular expense, the attorney shall obtain court approval before incurring the obligation.

b. In addition, the attorney must obtain advance district court approval for anticipated compensation in excess of amounts that shall be established for particular categories of cases from time to time by the supreme court. Until modified by subsequent order of this court, those amounts are as shown on exhibit "A" attached to these guidelines.

(1) The purpose of requiring such approval is not to inhibit reasonably necessary services, but to provide a system for monitoring and a basis for predicting and budgeting amounts necessary for such compensation.

(2) In determining whether an application should be sustained, the court shall consider whether the anticipated services are necessary in the reasonable professional judgment of counsel. The requirement that an application be made shall not have any bearing on whether an application should be sustained. Moreover, the court shall not require disclosure by the attorney of any information not subject to discovery under applicable law.

(3) Such applications, except as to appeals, ordinarily shall be made at arraignment, and in any event within the period available for discovery prior to trial. They shall not be made later except upon a showing of good cause.

c. Nothing in these guidelines shall affect the duty of the court to determine the amount of allowable compensation for court appointment services in accordance with applicable statutes.

5. Upon completion of services, the attorney shall file with the clerk of the district court a written application for compensation for court appointment services and expenses. The application shall be accompanied by an itemized statement showing the time necessarily spent on the case, the nature and extent of services and expenses, the penal consequences involved, the difficulty of handling and importance of the issue, responsibilities assumed and results obtained.

a. A copy of the application shall be provided to the county attorney.

b. If written request for hearing is not filed with the clerk within fifteen days after a copy of the application has been provided to the county attorney, or if hearing is earlier waived, the clerk shall direct the application for ruling to the trial judge, or if the case was not tried, to the presiding judge in the case. If hearing is requested, the clerk shall direct the application to the appropriate judge, as above stated, for hearing and ruling.

c. When hearing is held, the parties shall have the opportunity to offer evidence relevant to the factors affecting the amount of compensation.

d. In any event, the judge with responsibility for determining compensation is encouraged to consult with other judges of the district to obtain advice and guidance. Each district should establish procedures to facilitate

such consultation. Nothing in these guidelines, however, is intended to affect the prerogative of the responsible judge to determine the amount of compensation by appropriate ruling on the application.

6. When applicable law requires compensation to be made on the basis of ordinary and customary charges for like services in the community, the court shall not reduce compensation based on an attorney's duty to represent the poor but shall consider all of the factors dictated by pertinent statutory law and supreme court decisions, including certainty of payment. Moreover, the court shall consider the evidence, its own knowledge on the subject, and any other relevant information bearing on the issue. In order to provide guidance to the court and to foster uniformity in compensation for like services in like communities in the state, the supreme court shall from time to time promulgate guidelines including a range of hourly rates reflecting ordinary and customary charges for like services in the communities of the state, as provided by statute. Until modified by subsequent order of this court, that range is determined as shown in exhibit "A" attached to these guidelines. These guidelines shall be considered by the court, along with all other relevant information, in determining the reasonable value of the attorney's services in the community in question.

7. If aggrieved by the court's ruling, either the attorney or public entity may seek appellate review of the compensation award pursuant to the certiorari rules of the supreme court.

EXHIBIT A

Amounts which cannot be exceeded without prior approval of the district court in accordance with paragraph 4"*b*" of the guidelines:

1. Class A felonies, $2,500.
2. Class B felonies, $1,500.
3. Class C and D felonies and aggravated misdemeanors, $1,000.
4. Serious misdemeanors, $500.
5. Misdemeanors, $150.
6. Probable cause portion of parole revocation hearings, $200.
7. Postconviction relief proceedings, one-half of the present guideline for the offense in the original action.
8. Appeals to the Iowa Supreme Court, $1,600.
9. Representation of children in dissolution matters, $300.
10. Representation of patient at mental or substance abuse commitment hearing, $150.
11. Representation of party at juvenile case adjudication and disposition, $500. Representation of party at each additional review hearing to be determined by the court.
12. Representation of indigent wards, $150.

Range of hourly compensation in accordance with paragraph 6 of the guidelines: $40 to $60 per hour for attorneys, $20 to $30 per hour for paralegal/legal assistants.

App. 9

[Supervisory Order August 19, 1985, effective September 3, 1985; December 12, 1986, effective February 2, 1987]